Supreme Court, U.S.
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No. 01-1588

IN THE

Supreme Court of the United States

MICHAEL TODD BROSIUS,

Petitioner,

v.

WARDEN, UNITED STATES PENITENTIARY, LEWISBURG, PA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent offers no persuasive reasons why this Court should not grant Michael Todd Brosius's petition for a writ of certiorari and establish a uniform scope of review for military court-martial convictions. Respondent cannot deny and has not denied that the courts of appeal have developed a three-way split in their scope of review; Respondent attempts only to minimize the magnitude of that split and asserts that the magnitude does not justify this Court's review. Respondent has not asserted that this is an inconsequential issue for the nation because it clearly is of great moment. It is especially troubling that with a military that is as old as the Republic, and approximately a half century after *Burns v. Wilson*, the matter remains so unsettled. It is not enough to say that this is not the right case on which to resolve the split. The fact is that in this area, the United States will never have the "right case." Respondent argues that the lower courts properly determined that Brosius's claims do not justify habeas corpus relief. The lower courts did not analyze Brosius's claims under a *de novo* scope of review, however, and in any event, they — just like the Respondent here — sweep aside critical and undisputed facts that would be persuasive under that standard. Respondent's resort to the harmless error argument is unusual in a confession case and is the best indication that the Army's handling of this matter was an "error." Finally, the failure to address the ethical issue as anything other than harmless error shows that there is no acceptable explanation for the tactics employed here.

I. RESPONDENT DOES NOT DENY THE EXISTENCE OF A THREE-WAY SPLIT IN THE COURTS OF APPEAL.

Respondent makes no attempt whatsoever to deny that the courts of appeal have staked out three distinct methods of reviewing military convictions and that, accordingly,

results could differ depending only on the happenstance of where a military prisoner must seek review of his case. Indeed, Respondent expressly admits that the courts of appeal have "not produced a completely clear standard." Opp. at 11. These three methods of review are:

- In the D.C., Third, and Eighth Circuits, the courts review military cases in the same manner in which they review state court cases, Pet. at 10-11;
- In the First, Ninth, and Federal Circuits, the courts apply a *de novo* scope of review, Pet. at 11-12; and
- In the Fifth and Tenth Circuits, the courts initially apply the four-factor *Calley* test and then, if the four factors are satisfied, the courts apply a *de novo* scope of review, Pet. at 12-13.

With respect to the approaches used in the D.C., Third, and Eighth Circuits, Respondent reasons only that no split has yet developed *among these three courts*, because the D.C. and Eighth Circuits apparently have not had the occasion to decide whether AEDPA's new standards for reviewing state court convictions should apply to military cases as the Third Circuit decided here. Opp. at 13. In this case, it is quite clear that the Third Circuit used the 1996 AEDPA standards and applied a scope of review that is dramatically different from the federal courts' pre-1996 standards for reviewing state court convictions. Whether the D.C. and Eighth Circuits ultimately join the Third Circuit in its scope of review of military cases makes no difference. All of these courts have expressly stated that they review military convictions in the same manner they review state court convictions, and the Third Circuit's application of the very narrow 1996 AEDPA standard actually increases the magnitude of the split among the courts of appeal, regardless of whether the D.C. and Eighth Circuits join the Third Circuit. In this case, of course, the Third Circuit made no effort to explain why the AEDPA

standards should apply to military cases instead of the pre-1996 standards. This is a glaring omission, because the relevant AEDPA section on its face applies only to review of state court convictions and there is no expression of congressional intent to apply those standards to review of military cases. Indeed, the policy considerations as to the deference to be given to state court adjudications differ from those involving adjudications in the Armed Forces of the United States.

Respondent does not deny that the First, Ninth, and Federal Circuits use a *de novo* scope of review for military cases. For First Circuit cases, Respondent argues only that the court in *Allen v. Van Cantfort*, 436 F.2d 625 (1st Cir. 1971), performed its *de novo* review "briefly," and then leaps to the unjustified conclusion that the case "does not establish precedent for a *de novo* standard." Opp. at 12. Respondent makes no attempt to show why a "brief" *de novo* review does not establish *precedent* for a *de novo* review. If the First Circuit would have desired to perform a more restrictive review, it no doubt would have done so. Respondent also emphasizes that the Ninth and Federal Circuits developed their *de novo* standards while reviewing non-habeas cases seeking relief from court-martial sentences. Respondent does not disagree, however, that the courts use the same standards for reviewing military convictions regardless of whether the prisoner seeks review by way of a habeas corpus claim or some other claim. Pet. at 11 n.6.

Respondent also makes no effort to deny that the Fifth and Tenth Circuits use a hybrid approach, initially applying the four-factor *Calley* test and then — if the four factors are satisfied — applying a *de novo* scope of review. The effect of this approach is most evident in the Fifth Circuit's *Calley* case. After analyzing the four factors, *see* Pet. at 12, and determining that it would review the military conviction, the Fifth Circuit conducted an extensive *de novo* review of

those particular claims it believed were worthy of its consideration. *See Calley v. Callaway*, 519 F.2d 184, 203-28 (5th Cir. 1975).

In this case, the Third Circuit staked out the *most* restrictive of potential standards. The Third Circuit applied a 1996 statute concerning review of state court civilian cases with no indication that Congress intended the statute to apply to military convictions. Regardless of whether Todd Brosius — or any other military prisoner — ultimately is successful with his assertion of a habeas corpus claim, there is no reason why his case should be cast aside with such a narrow scope of review in Pennsylvania, where federal courts in Georgia, Maine, or Kansas (as well as numerous other jurisdictions) would apply a much broader scope of review.

II. APPLICATION OF A *DE NOVO* SCOPE OF REVIEW WOULD PRODUCE A DIFFERENT RESULT THAN THE THIRD CIRCUIT REACHED.

In addressing the merits of Brosius's claims, Respondent places undue emphasis on the factual aspects of those claims. *See* Opp. at 14 ("fact-bound contention" concerning whether Brosius was a "suspect" when he was interrogated); *id.* at 16 ("fact-bound claim" concerning whether Brosius was in "custody"). Apparently, Respondent is implying that Brosius is challenging the existence of historical facts or attempting to establish a *new* factual record to support his claims. We emphasize here, however, what we emphasized in the petition for certiorari and in the courts below: Brosius does not dispute any proper historical fact-finding. To the contrary, our position is that the undisputed facts clearly support his habeas corpus claim — especially under a *de novo* scope of review.

By referring to "fact-bound" claims, Respondent erroneously implies that there are no legal issues for this

Court or the lower courts to address, under a *de novo* scope of review or otherwise. That simply is not the case. Respondent does not deny that two issues central to this case are *legal* issues that courts routinely review *de novo*. "The determination of whether a person interviewed is a suspect is a question of law." *United States v. Muirhead*, 51 M.J. 94, 96 (C.A.A.F. 1999). Likewise, the issue of whether a person was in "custody" is a legal issue that court review *de novo* based on underlying facts. *Thompson v. Keohane*, 516 U.S. 99, 106-07 (1995). Underlying facts are necessarily intertwined with these issues, but in this case the factual record is undisputed.

Brosius adequately set forth in his petition for certiorari how courts applying a *de novo* scope of review would reach a different result from the conclusion that the Third Circuit reached here with its overly deferential AEDPA scope of review. We will not repeat that analysis here. Some issues and some of the Respondent's assertions, however, merit comment.

First, in reviewing the merits of Brosius' claims, this Court should remember one of the key aspects of *Burns v. Wilson*, 346 U.S. 137 (1953). Where the military courts do not dispose of claims "fully and fairly," the federal courts *are* entitled to "re-evaluate the evidence" in support of those claims. *Id.* at 142. Here, Brosius demonstrated in his petition for certiorari and in the courts below that the military trial judge openly speculated that outcome-determinative evidence existed in support of his legal conclusion that Brosius was not a "suspect" when he was interrogated. Pet. at 22-24. This alone establishes that the military proceeding was neither "full" nor "fair," and Respondent fails to address this issue.

Second, in addressing the merits of Brosius's claims, Respondent does not analyze how those claims would have been determined under a *de novo* standard. Instead, the gist

of Respondent's argument is that the lower courts properly decided the merits of these claims under the scopes of review that *they* applied. Respondent never denies that petitioners such as Brosius may receive different and more favorable treatment in jurisdictions other than the Third Circuit.

Third, Respondent erroneously states that Brosius raised one issue for the first time in the U.S. Court of Military Appeals — the undisputed existence of objective evidence (i.e., the seizure of his clothing) in support of his claim that he was a "suspect" when he was interrogated — and not in "either of the military courts with factfinding authority." Opp. at 15 n.4. However, Brosius *did* argue to the U.S. Army Court of Military Review that the seizure of his clothing — among other evidence — established that he was a "suspect." *See* Petition for New Trial, at 2-3, attached as Exhibit 5 to Exhibits in Support of Respondent's Response to Show Cause Order, filed in the District Court (Nov. 24, 1999).

Fourth, and most significantly, Respondent completely glosses over — indeed ignores — how the CID agents responded when Brosius made an unambiguous request for counsel. Their response, which the Department of Justice seems implicitly to condone here, was truly unusual and outrageous. Instead of providing counsel or, at the very least telling Brosius that he was not entitled to a lawyer as he requested, the agents deceived him into thinking that they were complying with his request by supplying the *prosecutor*, who had a previously-existing attorney-client relationship with Brosius and who then sat with Brosius during his interrogation. This is the conduct that brings Brosius's subsequent statements within the exception to the general rule of *Oregon v. Elstad*, 470 U.S. 298, 314 (1985). The agents *and this prosecutor* engaged in "deliberately coercive or improper tactics in obtaining the initial statement," *id.*, and subsequent statements — even those

obtained after rights warnings — are constitutionally inadmissible.

The undisputed facts, as summarized in the petition for certiorari, establish that Brosius is entitled to habeas corpus relief.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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